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9
10 **UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 **Darren MacDonald**, individually on behalf
13 of all others similarly situated,

14 Plaintiff,

15 v.

16 **Brian Gubernick, PLLC, and Brian**
17 **Gubernick,**

18 Defendants.

19 Case No. 2:20-cv-00138-SMB

20 **SECOND AMENDED**
21 **COMPLAINT**

22 **DEMAND FOR JURY TRIAL**

23 Plaintiff Darren MacDonald (“Plaintiff” or “MacDonald”) brings this Class Action
24 Complaint and Demand for Jury Trial against Brian Gubernick, PLLC d/b/a Homehelper
25 Consultants (“HHC”), and Brian Gubernick (“Gubernick”), to stop Defendants from
26 directing real estate agents to violate the Telephone Consumer Protection Act (“TCPA”)
27 by making unsolicited, autodialed calls to consumers, and to otherwise obtain injunctive
28 and monetary relief for all persons injured by Defendants’ actions. Plaintiff alleges as
follows upon personal knowledge as to himself and his own acts and experiences, and, as
to all other matters, upon information and belief, including investigation conducted by his
attorneys.

PARTIES

1. Plaintiff MacDonald is an Arizona resident.

2. Defendant Brian Gubernick, PLLC is an Arizona incorporated and headquartered company doing business as Homehelper Consultants. HHC conducts business throughout this District and the United States.

3. Defendant Brian Gubernick is an Arizona resident that conducts business throughout this District and the United States. Gubernick controls HHC.

JURISDICTION AND VENUE

4. This Court has federal question subject matter jurisdiction over this action under 28 U.S.C. § 1331, as the action arises under the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”).

5. This Court has personal jurisdiction over Defendants and venue is proper in this District under 28 U.S.C. § 1391(b) because Defendants reside in and/or do significant business in Arizona, and because the wrongful conduct giving rise to this case was directed by some or all of the Defendants from Arizona and to the Plaintiff in Arizona at his Arizona area code cellular phone number.

COMMON ALLEGATIONS

HHC Directs and Trains Agents to Cold Call Consumers and Provide them Leads and a Dialing Platform to do so

6. Keller Williams is an international real estate brokerage comprised of real estate franchises and real estate teams.

7. HHC operates a Keller Williams “Expansion Team.”

8. In real estate terms, “Expansion … is when a real estate team owner, who is part of a brokerage, expands his or her business outside of the local market. Think of

1 expansion as a team without geographic borders.”¹ Gary Keller, Keller Williams’s CEO,
2 was the first to conceive of expansion in the real estate industry, which he deemed “a
3 game-changing” initiative because it allowed top Keller Williams agents to expand their
4 operations nationwide.

5 9. HHC's Keller Williams Expansion Team currently operates in Arizona,
6 Michigan, Nevada, Oregon, and Washington.

7 10. HHC recruits and directly contracts with real estate agents in each of the
8 states in which it jointly operates its Expansion Team.

9 11. Real estate agents that contract with HHC to be a part of its Keller Williams
10 Expansion Team must also be affiliated with a local Keller Williams franchise in the
11 market area in which they work.

12 12. In HHC’s job postings, which are prepared by Gubernick, HHC makes
13 clear that they “***are seeking Phone Animals***” – i.e., agents with a “willingness and ability
14 to spend 80% to 90% of [the] workday on the phone” – and specifically identify the
15 following skills: “Ability to use or quickly learn Google Apps/Calendar, MOJO (SaaS
16 phone and dialing technology).”² In fact, the job posting makes clear that Gubernick
17 monitors and evaluates each agents’ productivity.

18 13. [REDACTED]
19 [REDACTED]
20 [REDACTED]

14. The Mojo Dialer system includes a “Power Dialer,” i.e., a dialer that can
automatically call an entire list of leads.

¹ <https://www.inman.com/2018/08/20/why-virtual-brokerages-will-make-real-estate-expansion-teams-unstoppable/>

² <https://www.linkedin.com/jobs/view/real-estate-inside-sales-at-homehelper-consultants-13411907/>

16. The Mojo Dialer system can import lists of leads, with associated phone numbers. The system can then generate sequential numbers and store these sequential numbers in a database, to indicate the automatic dialing order for leads.

17. For example, the following screenshots (on the next page) from Mojo demos show sequential numbers generated by the Mojo system and stored in its database, to indicate the call order for leads. The second image illustrates how the system can sequentially order hundreds of thousands of leads.

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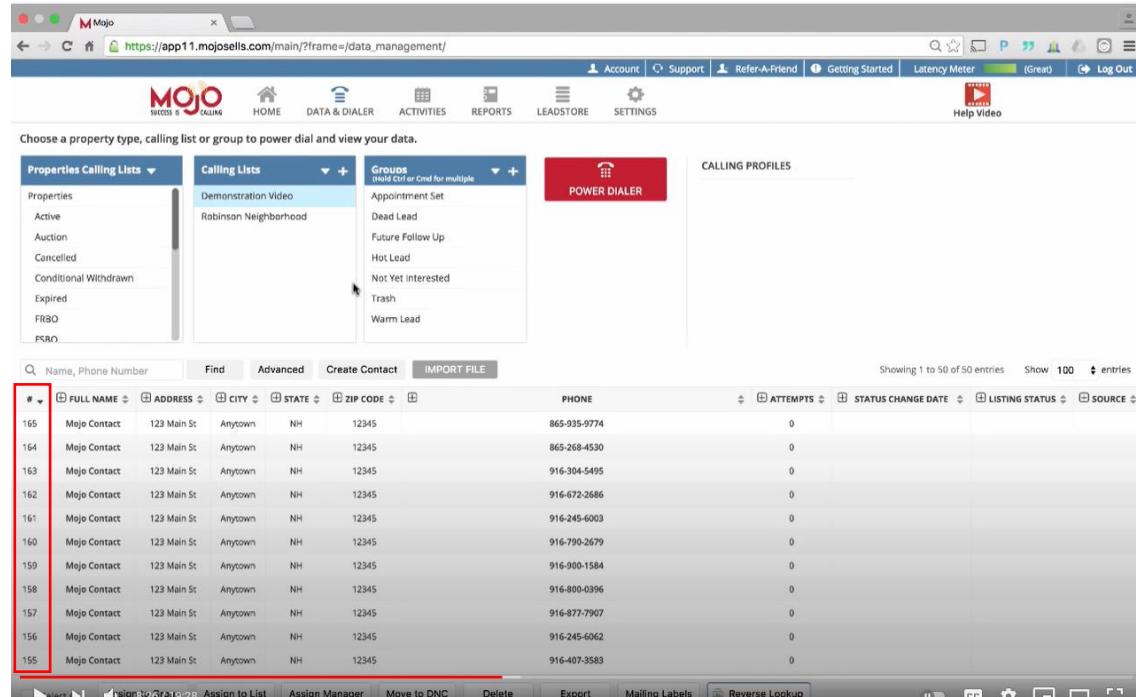
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The screenshot shows the MOJO software interface. At the top, there are navigation links: HOME, DATA & DIALER, ACTIVITIES, REPORTS, LEADSTORE, and SETTINGS. On the right side, there is a red button labeled "POWER DIALER". Below the navigation bar, there are three dropdown menus: "Properties Calling Lists", "Calling Lists", and "Groups". The "Groups" menu is expanded, showing items like "Appointment Set", "Dead Lead", "Future Follow Up", etc. A search bar at the top has the URL "https://app11.mojosells.com/main/?frame=/data_management/". Below the search bar, there is a table titled "CALLING PROFILES" with columns for "NAME", "PHONE", "ATTEMPTS", "STATUS CHANGE DATE", "LISTING STATUS", and "SOURCE". The table contains 15 rows of data, each representing a contact entry. A red box highlights the first seven rows of the table.

MOJO
SUCCEED IN CALLING

Choose a property type, calling list or group to power dial and view your data.

Properties Calling Lists

- Properties
- Active
- Auction
- Cancelled
- Conditional Withdrawn
- Expired
- FRBO
- PSBO

Calling Lists

- Demonstration Video
- Robinson Neighborhood

Groups (Hold Ctrl or Cmd for multiple)

- Appointment Set
- Dead Lead
- Future Follow Up
- Hot Lead
- Not Yet Interested
- Trash
- Warm Lead

POWER DIALER

Q Name, Phone Number Find Advanced Create Contact IMPORT FILE

#	FULL NAME	ADDRESS	CITY	STATE	ZIP CODE	PHONE	ATTEMPTS	STATUS CHANGE DATE	LISTING STATUS	SOURCE
165	Mojo Contact	123 Main St	Anytown	NH	12345	865-935-9774	0			
164	Mojo Contact	123 Main St	Anytown	NH	12345	865-268-4530	0			
163	Mojo Contact	123 Main St	Anytown	NH	12345	916-304-5495	0			
162	Mojo Contact	123 Main St	Anytown	NH	12345	916-672-2686	0			
161	Mojo Contact	123 Main St	Anytown	NH	12345	916-245-6003	0			
160	Mojo Contact	123 Main St	Anytown	NH	12345	916-790-2679	0			
159	Mojo Contact	123 Main St	Anytown	NH	12345	916-900-1584	0			
158	Mojo Contact	123 Main St	Anytown	NH	12345	916-800-0396	0			
157	Mojo Contact	123 Main St	Anytown	NH	12345	916-877-7907	0			
156	Mojo Contact	123 Main St	Anytown	NH	12345	916-245-6062	0			
155	Mojo Contact	123 Main St	Anytown	NH	12345	916-407-3583	0			

Import File

Export Mailing Labels Reverse Lookup

Quick Tip: How to use the Not Contacted filter

MOJO
SUCCEED IN CALLING

Choose a property type, calling list or group to power dial and view your data.

Properties Calling Lists

- Properties
- Active
- Auction
- Cancelled
- Conditional Withdrawn
- Expired
- FSBO
- Off Market

Calling Lists

- A Leads
- Benn's Test
- Beta Testing Video
- Brandon Import Dup
- Brandon Testy
- List refresh test
- New Design Webinar
- nico...

Groups (Hold Ctrl or Cmd for multiple)

- Appointment Set
- Dead Lead
- Expired 30
- Expired 60
- Expired 90
- FSBO 30
- FSBO 60
- FSBO 90

POWER DIALER

Q Name, Phone Number Find Advanced Create Contact IMPORT FILE

#	FULL NAME	ADDRESS	CITY	STATE	PHONE	ZIP CODE	SOURCE	STATUS CHANG
109432	Greenville	123 Main Street	Someplace	NW	864-370-2828	03124		
109431	Dayton	123 Main Street	Someplace	NW	800-682-4222	03124		
109430	Dallas	123 Main Street	Someplace	NW	972-423-3111	03124		
109429	Cleveland	123 Main Street	Someplace	NW	216-623-1313	03124		
109427	Charlotte	123 Main Street	Someplace	NW	704-342-1313	03124		
109426	Camden	123 Main Street	Someplace	NW	800-878-8736	03124		
109425	Buffalo	123 Main Street	Someplace	NW	716-824-2525	03124		

SECOND AMENDED CLASS ACTION COMPLAINT

1 18. The Mojo system can then automatically call through the list in the stored
 2 sequential order, e.g., from the last call dialed or from “top to bottom.” Mojo states:
 3 “You can easily call ALL leads in your list/group, from top to bottom, call ONLY from
 4 where you left off, including any new leads (ignoring previously dialed leads until you
 5 reach the end of the list), and even used custom dialing filters to slice and dice your list,
 6 based on many different call driven data points- very useful for complete list saturation.”³

EASY CALLING MODE: Choose how you would like to call your <u>Data Management Webinar</u> data. <input checked="" type="radio"/> Call this list from where I last left off starting with new leads first (popular for expired and off market data) <input type="radio"/> Call this list from top to bottom regardless of where I last left off (in order from newest to oldest)	CALL SETTINGS: <input type="checkbox"/> Use Call Me Mode (603) 444-6046 The Caller ID displayed while you call will be 6035004898 (NH Test) The Voicemail message you drop will be -- None -- The Callback message you drop will be test The number of lines dialing for you 3 The number of rings dialed before determine no answer is 4 Rings Calling Script -- None -- <input type="checkbox"/> Automatically show calling script on Live Answer Lead Sheet -- Default -- <input type="checkbox"/> Use Lead Sheet tab as default <input type="checkbox"/> Filter out contacts who have future call or appointment scheduled

18 19. [REDACTED]

20. [REDACTED]

21. [REDACTED]

22. [REDACTED]

23

24 25 ³ https://lb11.mojosells.com/support_site/knowledge_library

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 22. [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 23. [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 24. [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 25. As Jason Abrams (a former employee of Gubernick) described HHC's
22 initial training program to an audience full of Keller Williams executives and realtors
23 during a national Keller Williams event: "You've been onboarded, 2-week 10-day
24 process of watching amazing videos, I'm in all of them, they are great. They are 20
25 minutes a piece with an assessment at the end...then they hit the phone. On a daily basis
we are monitoring through BoomTown to make sure everyone is getting

1 contacted...Truthfully, the accountability comes from the Hub. We are checking it every
2 day. We are auditing our agents' BoomTown accounts every single day.”⁴

8 28. HHC's views on cold calling are best summed up by Gubernick, who
9 explained in a recent video for agents: "I would tell you in terms of lead generation as
10 you scale up, ***you've got to use the phone as your weapon of choice.*** What can you be
11 calling on? For us, it was anything from expired listings, to circle prospecting, to just-
12 sold, to circle prospecting, open house, non-owner occupieds, divorce lists, or a probate
13 list. To me it didn't really matter, I just wanted contacts and that's really what it's about,
14 the number of contacts you can generate."⁵

15 29. The cold calling practices HHC requires of its agents are consistent with the
16 direction to all Keller Williams team leaders (like Gubernick and Abrams) and agents
17 from Keller Williams's CEO Gary Keller and from other parts of Keller Williams's
18 organization, including from Abrams, who is Keller Williams's Vice President of
19 Industry and a Keller Williams national trainer (in addition to his role in HHC and AI).

20 30. For example, in his books and other materials, Keller instructs agents that
21 they must approach lead generation – which he specifically describes to include cold
22 calling consumers using calling software and services– in a systematic way, writing:

- “Peak performance in sales requires you to have a systematic marketing-based Lead-Generation Model.” and “success in the lead-generation game

⁴ <https://www.youtube.com/watch?v=l39M9hZPKrs&t=7s>

⁵ <https://www.youtube.com/watch?v=vVKu4nXImjI&t=34s>

1 is in the numbers, so you simply can't overdo it. Again, let me reiterate that
 2 you can never have too many leads."

- 3 • "The issue of leads should always be at the forefront of your business
 4 consciousness."
- 5 • "No matter how you slice it, lead generation will almost always come down
 6 to a game of numbers. For effective lead generation, you need to be
 7 systematic."

8 31. Consistent with this, Keller has been quoted in Keller Williams videos
 9 promoting precisely the lead generation system HHC and AI requires of their Keller
 10 Williams Expansion Team agents: "We want every agent to wake up in the morning and
 11 put in 3-4 hours of lead-generation time before noon."⁶

12 32. Keller has even described obtaining lists of leads and telemarketing to them
 13 as the best means of expanding from a single agent operation to a team.

14 33. Similarly, Keller Williams provides training across its organization that is
 15 substantively the same as the training HHC in turn provides to its agents. This includes
 16 courses taught by Abrams such as "Expand Your Market and Your Business," in which
 17 " Abrams discusses the different pillars of his business and how he prospects nationwide,"
 18 a course called "Mega Agent Expansion"⁷ taught by both Abrams and Gubernick, and
 19 courses on how to work the Mojo Dialer, including "Mojo Walkthrough" and "Mojo
 20 Mastery: Master Follow Up Prospecting." It also includes individualized coaching
 21 programs intended to reinforce "The 3 Hour Habit" (*i.e.*, cold calling), including
 22 "Practicing scripts and calling FSBOs or Expired Listings," which Keller Williams
 23 describes as "the most important part of the class."⁸

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 26 ⁶ https://www.youtube.com/watch?time_continue=1&v=8yuk1tslcck

27 ⁷ <http://kwrievents.kw.com/ehome/318820/702606>

28 ⁸ <https://www.kwredlabel.com/kwucourses/leadgen36123/student/KWU-LEAD-GEN-STU.html>

PLAINTIFF MACDONALD'S ALLEGATIONS

34. On January 4, 2018, Plaintiff MacDonald received a call to his cellular phone number from an HHC agent, Christine Hotchkin, using the phone number 503-498-6590.

35. The call was made using the Mojo Dialer

36. When Plaintiff answered the call, he noticed that it began with a pause, which typically indicates the use of an autodialer.

37. Hotchkin was calling to offer Defendants' real estate brokerage services to Plaintiff.

38. Plaintiff told the agent he was not interested and that he wanted his phone number removed from her list.

39. Plaintiff never consented to receiving solicitation calls from any of the Defendants.

40. Plaintiff was not looking to sell his home and was not otherwise seeking real estate brokerage services.

41. The unauthorized telephone call made by Defendants, as alleged herein, has harmed Plaintiff MacDonald in the form of annoyance, nuisance, and invasion of privacy, and disturbed the use and enjoyment of his phone, in addition to the wear and tear on the phone's hardware (including the phone's battery) and the consumption of memory on the phone.

42. Seeking redress for these injuries, Plaintiff MacDonald, on behalf of himself and a Class of similarly situated individuals, bring suit under the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq., which prohibits unsolicited autodialed text messages to cellular telephones.

CLASS ALLEGATIONS

Class Treatment Is Appropriate for Plaintiff's TCPA Claim

43. Plaintiff MacDonald bring this action pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3) and seek certification of the following Class:

All persons in the United States who from four years prior to the filing of this action through class certification (1) an HHC agent called, (2) on the person's cellular phone number, (3) using the Mojo Dialer, (4) based on a lead provided by HHC to the agent.

44. The following individuals are excluded from the Class: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, their subsidiaries, parents, successors, predecessors, and any entity in which any Defendant or its parents have a controlling interest and their current or former employees, officers and directors; (3) Plaintiff's attorneys; (4) persons who properly execute and file a timely request for exclusion from the Class; (5) the legal representatives, successors or assigns of any such excluded persons; and (6) persons whose claims against Defendants have been fully and finally adjudicated and/or released. Plaintiff MacDonald anticipates the need to amend the Class definitions following appropriate discovery.

45. **Numerosity:** On information and belief, there are thousands of members of the Class such that joinder of all members is impracticable.

46. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff MacDonald and the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

- a. whether HHC agents used an automatic telephone dialing system to place phone calls to Plaintiff and the members of the Class;
 - b. whether the agents made those calls without prior express written consent;
 - c. whether the agents made those calls at Gubernick's direction;

- d. whether the agents made those calls at HHC's direction;
 - e. whether HHC is vicariously liable for the agents' calls; and
 - f. whether Defendants' conduct was willful or knowing, entitling the class to treble damages.

5 **47. Adequate Representation:** Plaintiff MacDonald will fairly and adequately
6 represent and protect the interests of the Class, and has retained counsel competent and
7 experienced in class actions. Plaintiff MacDonald has no interests antagonistic to those of
8 the Class, and Defendant has no defenses unique to Plaintiff. Plaintiff MacDonald and his
9 counsel are committed to vigorously prosecuting this action on behalf of the members of
10 the Class, and have the financial resources to do so. Neither Plaintiff MacDonald nor his
11 counsel have any interests adverse to the Class.

12 48. **Appropriateness:** This class action is also appropriate for certification
13 because Defendant has acted or refused to act on grounds generally applicable to the
14 Class as a whole, **thereby** requiring the Court's imposition of uniform relief to ensure
15 compatible standards of conduct toward the members of the Class and making final class-
16 wide injunctive relief appropriate. Defendant's business practices apply to and affect the
17 members of the Class uniformly, and Plaintiff's challenge of those practices hinges on
18 Defendants' conduct with respect to the Class as a whole, not on facts or law applicable
19 only to Plaintiff. Additionally, the damages suffered by individual members of the Class
20 will likely be small relative to the burden and expense of individual prosecution of the
21 complex litigation necessitated by Defendants' actions. Thus, it would be virtually
22 impossible for the members of the Class to obtain effective relief from Defendants'
23 misconduct on an individual basis. A class action provides the benefits of single
24 adjudication, economies of scale, and comprehensive supervision by a single court.

FIRST CLAIM FOR RELIEF
Telephone Consumer Protection Act
(Violation of 47 U.S.C. § 227)

(On Behalf of Plaintiff MacDonald and the Class and against all Defendants)

49. Plaintiff MacDonald repeats and realleges the above paragraphs of this Complaint and incorporates them by reference.

50. Defendants' agents made unwanted solicitation telephone calls to cellular telephone numbers belonging to the Plaintiff and the other members of the Class using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

51. These solicitation telephone calls were made en masse without the prior express written consent of the Plaintiff and the other members of the Class.

52. Defendant Gubernick personally directed the agents' calls.

53. Defendant HHC controlled, apparently authorized, and/or ratified the agents' calls.

54. Defendants have, therefore, violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result of Defendants' conduct, the Plaintiff and the other members of the Class are each entitled to a minimum of \$500 in damages, and up to \$1,500 in damages, for each violation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MacDonald, individually and on behalf of the Class, pray for the following relief:

55. An order certifying this case as a class action on behalf of the Class as defined above; appointing Plaintiff MacDonald as the representative of the Class; and appointing his attorneys as Class Counsel;
56. An award of actual and/or statutory damages and costs;
57. An order declaring that Defendants' actions, as set out above, violate the TCPA;

58. An injunction requiring Defendants to cease all unsolicited calling activity, and to otherwise protect the interests of the Class; and
 59. Such further and other relief as the Court deems just and proper.

JURY DEMAND

Plaintiff MacDonald requests a jury trial.

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